

Memorandum 2000-12**Early Disclosure of Valuation Data and Resolution of
Issues in Eminent Domain**

In connection with its work on litigation expenses in eminent domain, the Commission has decided to investigate the possibility of early resolution of eminent domain legal issues and early exchange of valuation data. The concept is that if these matters can be resolved earlier in the proceedings, the need for a trial and its attendant expenses will be lessened.

EXISTING LAW

In almost all condemnation cases, the primary issue is the amount of compensation. Evidence is introduced in support of each party's contention of the value of the property taken and damages to the remainder. Valuation disputes may arise from such matters as differing interpretations of sales data and differing opinions of highest and best use, probability of changes in zoning, probability of dedication, feasibility of development and legal compensability of loss. See Matteoni, "Trial Preparation and Trial", 1 *Condemnation Practice in California 2d* § 9.2 (Cal. Cont. Ed. Bar 1999).

As a general rule, conventional discovery techniques have been of little value in generating useful information concerning the key points of disagreement between the parties. This is because the critical evidence in eminent domain proceedings is expert opinion testimony, and valuation experts who may be called to testify at trial resist formulating an opinion for that purpose until the time of trial.

As a result, California has adopted special discovery rules for eminent domain proceedings, which provide for an early exchange of valuation data on demand on a party. Code Civ. Proc. §§ 1258.210-1258.300. The history of these provisions indicates a consistent trend to push the exchange ever earlier in the proceedings. Effective January 1, 2000, the exchange is required 60 days before trial. Code Civ. Proc. § 1258.220.

While the parties do not always take advantage of the availability of the exchange procedure for various tactical reasons, there is a strong incentive to use it due to the operation the litigation expense statute. Because an award of litigation expenses under Code of Civil Procedure Section 1250.410 is predicated on the reasonableness of the parties, each party must make a good faith effort to understand and respond to the other's case. A party who does not seek to review the opponent's case in advance of trial is at risk of being determined not to have acted reasonably in the proceeding.

HISTORICAL BACKGROUND

The valuation exchange statute was first enacted in 1967 on recommendation of the Law Revision Commission. The Commission pointed out the unique problems of eminent domain discovery, the effective use of exchange procedures in Los Angeles, and the need for uniformity throughout the state.

The Commission noted that an early exchange of valuation data would provide a relatively inexpensive means of eminent domain discovery, reduce the necessity for interrogatories and depositions, and provide a number of advantages:

First, it will tend to assure the reliability of the data upon which the appraisal testimony is based. The parties will have had an opportunity to test the data through investigation prior to trial. The opportunity for pretrial investigation should curtail the time required for the trial and in some cases may facilitate settlement. Second, if the exchange of information takes place prior to the pretrial conference, the conference may serve a more useful function. Having checked the supporting data in advance, the parties may be able to stipulate at the pretrial conference to highest and best use, to the comparability of other sales, to the admissibility of other evidence, and perhaps even to the amounts of certain items of damage.

Discovery in Eminent Domain Proceedings, 8 Cal. L. Revision Comm'n Reports 19, 21 (1967)

As enacted at Code of Civil Procedure Sections 1272.01-1272.09, the statute departed from the Commission's recommendation in two significant ways — it required the responding party to make a counterdemand in order to obtain the demanding party's data, and it provided for an exchange too close to the time of trial. These defects were corrected in 1975, on recommendation of the

Commission, providing for a mutual exchange 40, rather than 20, days before trial. Code Civ. Proc. § 1258.220.

Legislation enacted at the 1999 legislative session pushes the exchange back to 60 days before trial, effective January 1, 2000. This legislation was sponsored by CalTrans. See 1999 Cal. Stat. ch. 102 § 2. The argument made in support of the change is that the extended time period gives both parties an adequate opportunity to examine each other's valuation data and depose expert witnesses before making a final offer or demand. This will facilitate reasonable offers and demands, resulting in a greater number of settlements. It could also yield reduced court costs. See *Senate Floor Analysis of SB 634* (6/17/99). Since this legislation has just become operative, we have no experience under it. There is experience, however, under comparable local rules of the Los Angeles County superior court.

LOS ANGELES LOCAL RULES

The Los Angeles County superior court rules require a first pretrial conference when an eminent domain case is at issue followed by a final pretrial conference approximately 60 days before trial. LA Sup. Ct. Rules 16.2(f). Between the first and final pretrial conferences the parties must complete all law and motion matters, and all deposition and discovery proceedings. LA Sup. Ct. Rules 16.12. Valuation data are exchanged at the final pretrial conference. This is followed by a mandatory settlement conference approximately 30 days before trial. Appearance of counsel at the settlement conference is required, and the parties must be available to authorize and approve settlement terms and provisions. LA Sup. Ct. Rules 16.17. This procedure appears to have worked well in Los Angeles County, and to our knowledge the parties as well as the court are satisfied with it.

EVALUATION OF EXCHANGE PROCEDURES

Norm Matteoni suggests that the purpose of the pretrial exchange of valuation data — to provide each party with the relevant facts on which the opposition will base its valuation opinion — is not always accomplished, even under the Los Angeles County rules. Matteoni, "Trial Preparation and Trial", 1 *Condemnation Practice in California 2d* § 9.14 (Cal. Cont. Ed. Bar 1999). He notes many obstacles to effective exchange of data:

- Appraisers attempt to limit disclosure of relevant data, providing only a minimal amount of helpful information to opposing counsel.

- A party who fully discloses is at a disadvantage against a party who does not. While the Los Angeles County rules provide some protection against unequal exchange, a party who acts in good faith is nonetheless penalized by having gone to the effort to prepare a complete report.

- Further discovery following an exchange is ordinarily necessary. However, because the exchange does not occur until 40 days before trial, discovery may be needed as close as 15 days before trial. [Staff note: This may change with the new 60 day exchange rule effective January 1.]

- Although it is theoretically possible to enforce full discovery by limiting evidence to the data disclosed, courts have been flexible in their application of the rules and have exercised their discretion to allow admissibility of evidence that was not previously disclosed.

These 1999 observations are consistent with those made by Gideon Kanner more than twenty-five years ago in his article, *Sic Transit Gloria: The Rise and Fall of Mutuality of Discovery in California Eminent Domain Litigation*, 6 Loyola L.A. L. Rev. 447 (1973). Professor Kanner notes similar concerns, and concludes that mutuality of discovery is “a somewhat glittering generality which as a matter of practice may not be available to aggrieved litigants.” 6 Loyola L.A. L. Rev. at 480.

SOME NUMBERS

The available statistics bear out these critiques of the Los Angeles rules. The statistics do not indicate any greater incidence of settlements in Los Angeles County eminent domain cases than elsewhere in the state. The latest available data from the Judicial Council for the three-year period including fiscal years 1996-97, 1997-98, and 1998-99, indicate about the same rate of contested trials in Los Angeles County as elsewhere in the state. (All the following percentages are rounded to the nearest whole.)

During the three year period from July 1, 1996, to June 30, 1999, there were 3,783 eminent domain cases filed statewide, of which 559 (15%) were filed in Los Angeles County. Of the 3,477 pending eminent domain cases disposed of statewide during that period, 215 (6%) were Los Angeles County cases.

An analysis of the 215 Los Angeles County eminent domain dispositions reveals that 199 (93%) were either disposed of before trial or after trial as

uncontested matters. Only 16 cases (7%) were disposed of after trial as contested matters.

In the rest of the state during the same period, of the 3262 eminent domain dispositions, 3001 (92%) were disposed of either without trial or after trial as uncontested matters. A total of 261 cases (8%) were disposed of after trial as contested matters.

CONCLUSION AS TO EARLY EXCHANGE OF VALUATION DATA

It is not clear that the Los Angeles County rules on exchange of valuation data foster settlement to a greater degree than the existing statutory scheme. Moreover, the existing statutory scheme has been revised effective January 1 to provide an earlier pretrial exchange date, and we do not yet have experience under the revised statute. **For the present, the staff recommends against further statewide extension of the Los Angeles County system on pretrial exchange of valuation data.**

EARLY RESOLUTION OF LEGAL ISSUES

It should become apparent at the pretrial conference whether there are questions of law on which the parties disagree that affect valuation of the property. Resolution of matters such as contentions over what constitutes the larger parcel, whether or not there is an impairment of access, or the probability of a zoning change, should be resolved before the jury trial on valuation. The pretrial conference can isolate many of these questions and provide for their determination before trial and, ideally, before valuation data are exchanged and final offers and demands filed. See Matteoni, "Trial Preparation and Trial", 1 *Condemnation Practice in California 2d* § 9.12 (Cal. Cont. Ed. Bar 1999).

Early resolution of legal issues can be accommodated because legal issues are for court rather than jury determination. Under existing law, bifurcation of legal issues may be accomplished under Code of Civil Procedure Sections 598 (where economy and efficiency of handling litigation would be promoted) and 1048 (court may order separate trial of issues where conducive to expedition and economy, preserving the right to jury trial), and under Evidence Code Section 320 (court's power to regulate order of proof). Cf. Code Civ. Proc. §§ 588-592 (trial of issues of law and fact). However, there is nothing explicit in the Eminent

Domain Law on the matter, other than early resolution of right to take issues. Code Civ. Proc. § 1260.110.

It is common for courts to establish local rules to require that in limine motions to exclude evidence be filed and served in advance of the trial date. To expedite testimony before a jury, courts routinely conduct hearings in limine to determine the admissibility of evidence. Rule 16.10(b)(4) of the Los Angeles County superior court rules endorses the process of a hearing before impaneling the jury.

Norm Matteoni reports, though, that some courts resist bifurcation or in limine motions, preferring to hear the matter only once and sort things out at trial. See Matteoni, “Trial Preparation and Trial”, 1 *Condemnation Practice in California 2d* § 9.24-9.25 (Cal. Cont. Ed. Bar 1999). While this may save the judge time, it does not save the jury time, and does not foster early resolution of disputes and settlement of cases.

It may be worthwhile to develop express statutory provisions on the matter for eminent domain cases. There is at least one model for this in the Eminent Domain Law. An “improvement pertaining to the realty” is an improvement installed for use on property taken by eminent domain that cannot be removed without a substantial economic loss; improvements pertaining to the realty must be taken into account in determining compensation. Code Civ. Proc. §§ 1263.205, 1263.210. The Eminent Domain Law provides for early resolution of a dispute over whether a particular improvement should be characterized as an improvement pertaining to the realty for compensation and other purposes:

Code Civ. Proc. § 1260.030. Determination of character of improvements where parties are unable to agree

1260.030. (a) If there is a dispute between plaintiff and defendant whether particular property is an improvement pertaining to the realty, either party may, not later than 30 days prior to the date specified in an order for possession of the property, move the court for a determination whether the property is an improvement pertaining to the realty.

(b) A motion under this section shall be heard not sooner than 10 days and not later than 20 days after service of notice of the motion. At the hearing, the court may consider any relevant evidence, including a view of the premises and property, in making its determinations.

The timing of the motion is keyed to the order for possession because removal rights in the improvement are also implicated.

It would be possible to add a parallel but more general provision for disputes over legal issues affecting valuation. Something along the following lines might work:

Code Civ. Proc. § 1260.040 (added). Resolution of legal issues affecting valuation

1260.040. If there is a dispute between plaintiff and defendant over a legal issue affecting the determination of compensation, either party may, not later than 30 days before commencement of trial on the issue of compensation, move the court for a ruling on the matter. A motion under this section shall be heard not sooner than 10 days and not later than 20 days after service of notice of the motion.

Comment. Section 12160.040 is intended to provide a mechanism by which a party may obtain early resolution of a legal dispute affecting valuation. Nothing in this section precludes use other mechanisms for the same purpose, including bifurcation of issues and control of order of proof pursuant to statute and in limine hearings or other pretrial procedures pursuant to court rule.

Respectfully submitted,

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